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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Nathaniel Fleck and Alma Bergmann as Co-Trustees of the George J. Fleck Trust,	)	
Plaintiffs/Appellants,	)	Supreme Court No. 20150106
vs.	)	
Missouri River Royalty Corporation, Exxon Mobil Corporation, and Mountain Pacific General Inc.,	)	
Defendants/Appellees.	)	

Appeal from Judgment Dated April 9, 2015
Case No. Case No. 27-2012-CV-00169
County of McKenzie, Northwest Judicial District
The Honorable Robin A. Schmidt, Presiding

BRIEF OF DEFENDANTS/APPELLEES MISSOURI RIVER ROYALTY CORPORATION AND EXXON MOBIL CORPORATION

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

[¶1] Whether the district court erred by granting the Defendants' motions for summary judgment and holding that the oil and gas lease at issue remains valid and in effect based on drilling operations, reworking operations, and production of oil and gas from the leased lands and lands pooled with the leased lands.

STATEMENT OF THE CASE

[¶2] This case requires the Court to address whether there was a sufficient combination of oil and gas production, reworking operations, and new drilling operations to hold an oil and gas lease. Upon consideration of cross-motions for summary judgment, the district court concluded that there was, granting motions filed by Missouri River Royalty Corporation ("Missouri River"), Exxon Mobil Corporation ("Exxon"), and Mountain Pacific General Inc. ("Mountain Pacific") (collectively "the Lessees") and denying the motion filed by Nathaniel Fleck and Alma Bergmann, Co-Trustees of the George J. Fleck Trust ("Fleck"). *See* Appellant's Appendix ("App.") at 50–62.

[¶3] Fleck now appeals, arguing that the lease at issue terminated because the Fleck 1 well stopped producing oil and gas in paying quantities in late 2010. More specifically, Fleck contends that because the cost of operating the Fleck 1 well between July 2010 and June 2013 exceeded the revenue it generated by about $280,000, the well was uneconomic and the lease terminated. *See* App. at 98. Fleck's argument must be rejected and the district court's judgment affirmed because the Fleck 1 well never stopped producing oil and gas, and even if it had, the Defendants engaged in sufficient drilling and reworking operations on the Fleck 1 and other wells to hold the lease.

STATEMENT OF FACTS

I. The Parties and Subject Lease.

[¶4] Fleck owns an interest in the oil, gas, and other minerals in and under the following described lands located in McKenzie County, North Dakota:

> Township 150 North, Range 100 West
> Section 10: S/2

("Subject Lands"). *See* App. at 5, ¶ 6.

[¶5] On August 30, 1972, Fleck's predecessors in interest executed an oil and gas lease in favor of Morris E. Ogle, covering all of their interest in the oil and gas in and under the Subject Lands ("Fleck Lease"). The Fleck Lease provided for a term of ten years "and as long thereafter as oil or gas or either of them is produced from said land . . . ." *See* App. at 102–03.

[¶6] The Fleck Lease further provided that if production shall cease following the expiration of the primary term, the Lease "shall not terminate if lessee resumes operations for the drilling of a well or restoration of production within ninety (90) days from such cessation and this lease shall remain in force and effect during the prosecution of such operations and, if production results therefrom, then as long thereafter as such production continues." *See* App. at 102.

II. The Fleck 1 Well.

[¶7] On or about May 19, 1982, Exxon Corporation completed the Fleck #1 well as a producer of oil and gas from the Red River formation, and thereby extended the Fleck Lease into its secondary term. *See* App. at 86. The name of the Fleck #1 well was later changed to the Fleck 1 well. *See* App. at 85. Although the Fleck 1 well apparently produced little oil or gas between 1982 and 1991, *see* App. at 96–97, there is no evidence the validity of the Fleck Lease was ever challenged during that period.

[¶8] In 1991, Missouri River acquired an interest in the Fleck Lease and began operating the Fleck 1 well. *See* Appellee's Supplemental Appendix ("Supp. App.") at 1–2. On or about August 19, 1992, Missouri River recompleted the Fleck 1 well in the Duperow formation. *See* App. at 86, 96.

[¶9] In late 2010, after producing more than 60,000 barrels of oil during twenty years of operation, production from the Fleck 1 slowed. *See* App. at 88–89. Over the next several months, Missouri River continued to produce the well intermittently. *See* App. 88–89. Beginning in July 2011, Missouri River expended more than $100,000 on workover operations to increase production from the Fleck 1 well. *See* App. at 159, ¶ 4. The Fleck 1 well continues to produce oil and gas at this time. *See* Supp. App. at 34–35.

III. Amendment of the Spacing Unit.

[¶10] On December 16, 2011, Zenergy, Inc. filed an application with the North Dakota Industrial Commission ("NDIC" or "Commission") to amend the field boundaries and field rules for the Sandrocks-Bakken Pool to establish a 1280-acre spacing unit comprised of all of Sections 9 and 10, Township 150 North, Range 100 West, McKenzie County, North Dakota ("Sanders Unit"). *See* App. at 206. The spacing unit proposed by Zenergy, Inc. includes all of the Subject Lands.

[¶11] On August 15, 2012, Zenergy, Inc.'s application was granted and the Sanders Unit was established by the Commission. *See* App. at 206–14. Five days later, the NDIC issued Zenergy, Inc. a permit to drill the Sanders 9-10H well on the new spacing unit. *See* App. at 215–16. However, a dispute arose between Zenergy, Inc. and Triangle USA Petroleum Corporation ("Triangle") over which company had the right to drill on the Sanders Unit. *See* Supp. App. at 3–7. Triangle asserted that it was entitled to drill on the Sanders Unit under Section 43-02-03-16.2 of the North Dakota Administrative Code because Triangle and its supporters owned a greater working interest in the Unit than Zenergy. Supp. App. at 4, ¶¶ 4–5. Ultimately, Zenergy, Inc. withdrew its application and the permit for the Sanders 9-10H was canceled on April 22, 2013. *See* App. 217.

IV. Triangle USA Petroleum Corporation's Wells.

[¶12] In April, 2013, Triangle filed applications with the NDIC for permits to drill two new wells in the Sanders Unit. *See* Supp. App. at 8–11. Both permits were approved in August 2013. *See id.*

[¶13] On August 19, 2013, Triangle, with Missouri River's participation, spud the Sanders 150-100-9-10-1H well on the Sanders Unit. *See* App. at 159, ¶ 5; Supp. App. at 12. The Sanders 150-100-9-10-1H well produced more than 70,000 barrels of oil in its first year of production. *See* Supp. App. at 12.

[¶14] On September 4, 2013, Triangle, again with Missouri River's participation, spud the Sanders 150-100-9-10-2H well on the Sanders Unit. *See* App. at 159, ¶ 5; Supp. App. at 13. The Sanders 150-100-9-10-2H well also produced more than 70,000 barrels of oil in its first year of production. *See* Supp. App. at 13.

ARGUMENT

[¶15] Citing dicta from a recent opinion entered by this Court, Fleck argues that production from the Fleck 1 well was not "in paying quantities" simply because the cost of operating the well exceeded the revenue generated by it during a three-year window Fleck selected. This argument is substantially different from their argument in district court, which focused more on the assertion that the Lease terminated because Missouri River did not engage in drilling operations within ninety days of cessation of production. More importantly, it is unsupported by North Dakota case law and the facts of this case.

[¶16] As the district court held, oil or gas have been continuously produced from the Fleck Lease since the Fleck 1 well was recompleted by Missouri River in 1991. Because oil or gas have been continuously produced, the Lease remains valid and in effect under the plain language of the habendum clause. *See* App. at 102. A three-year snapshot of the profits and losses of a single well does not, on its own, control whether the Fleck Lease terminated based on cessation of production. Accordingly, for the reasons explained in more detail below, the Court should affirm the district court's judgment.

I. The Standard of Review.

[¶17] The standard of review identified in Fleck's Brief is accurate. Nevertheless, it should be noted that Fleck bears the burden of proof in this proceeding. *Sorum v. Schwartz (Sorum II)*, 411 N.W.2d 652, 654 (N.D. 1987). In *Sorum II*, this Court emphasized that "[f]orfeitures [of oil and gas leases] are not favored . . . ." *Id.* (citing *Helm Bros., Inc v. Trauger*, 389 N.W.2d 600 (N.D. 1986)). In lease forfeiture cases, "the burden of proof is on the party claiming the forfeiture of the lease." *Id.* (citing *Mich. Wis. Pipeline Co. v. Mich. Nat'l Bank*, 324 N.W.2d 541 (Mich. 1982)).

[¶18] Because Fleck bears the burden of proof, to affirm, this Court need only conclude that Fleck failed to come forward with sufficient evidence to raise a fact issue as to whether he can demonstrate the Lease terminated at trial. *Cf. Sorum II*, 411 N.W.2d at 654 (concluding after a bench trial that the lessor had not carried his burden of demonstrating that an oil and gas lease terminated based on cessation of production). By contrast, to reverse and grant Fleck's cross-motion for summary judgment, as Fleck has requested, the Court must hold, viewing the evidence in the light most favorable to the Lessees, that no reasonable trier of fact could conclude that the Fleck Lease remains valid and in effect. *See In re Estate of Richmond*, 2005 ND 145, ¶ 17, 701 N.W.2d 897.

II. The Fleck Lease Remains Valid and in Effect under the Plain Language of the Habendum Clause.

[¶19] Whether an oil and gas lease continues under a particular set of circumstances depends on the language of the lease provisions, including the habendum clause and any savings clauses, read and considered together. *See Tank v. Citation Oil & Gas Corp.*, 2014 ND 123, ¶ 10, 848 N.W.2d 691. In this case, the habendum clause of the Fleck Lease provided for a "term of ten (10) years and as long thereafter as oil or gas, or either of them, is produced from" the Subject Lands. *See* App. at 102. Thus, the Lease had a primary term of ten years and a secondary term "as long thereafter" as "oil or gas . . . is produced" from the leased premises. *See Egeland v. Cont'l Res., Inc.*, 2000 ND 169, ¶ 3 n.1, 616 N.W.2d 861.

[¶20] In addition to the habendum clause, the Fleck Lease also contained at least one savings clause—which is a "lease clause designed to enable a lessee to keep a lease alive under certain circumstances without the production otherwise required." *See* 8 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Oil and Gas Law* 947 (2013). The relevant savings clause in the Fleck Lease is a "cessation of production clause," which is a "lease clause providing that under certain circumstances a lease may be preserved despite cessation of production in the primary or secondary term." *Id.* at 141. As relevant to this case, the Fleck Lease's cessation of production clause provides:

> If, after the expiration of the primary term hereof, production shall cease from any cause, this lease shall not terminate if lessee resumes operations for the drilling of a well or restoration of production within ninety (90) days from such cessation, and this lease shall remain in force and effect during the prosecution of such operations and, if production results therefrom, then as long a thereafter as such production continues.

App. at 102.

[¶21] Thus, reading the habendum clause and the cessation of production clause together, the first question that must be addressed in this case is whether, during the three-year period that began in July 2010 and ended in June 2013, "oil or gas . . . [was] produced" from the leased premises within the meaning of the habendum clause. If, based on the undisputed material facts the answer is "yes," no further inquiry is necessary and the district court's judgment must be affirmed.

[¶22] If the answer is no, additional questions must be answered under the cessation of production clause: First, when did oil and gas production "cease," as that term is used in the cessation of production clause?

Second, did "lessee[s] resume operations for the drilling of a well or restoration of production within ninety (90) days from such cessation[?]" App. at 102. Again, if the undisputed material facts demonstrate that the answer to the final question is "yes," the district court's judgment must be affirmed.

A. The Fleck Lease Remains Valid and in Effect Because Oil or Gas Have Been Continuously Produced from the Leased Premises Since 1991.

[¶23] As an initial matter, Fleck makes repeated references to the apparent absence of production from the Fleck Lease for most of the 1980s. Although it is true that there is little evidence in the record of production occurring during the 1980s, *see* App. at 96–97, it is also irrelevant. The statute of limitations ran long ago on any claim Fleck may have had for termination of the Lease based on the lack of production during the 1980s, as Fleck's counsel is well aware. *See* N.D.C.C. § 28-01-15. Moreover, there is no evidence in the record of whether there were any agreements between the lessors and lessees regarding lack of production in the 1980s or of the lessors' opinion of Missouri River's efforts to restore production in the 1990s. Those issues are simply irrelevant and should not be considered by the Court.

[¶24] What should be considered is whether oil or gas was "produced" from the Fleck 1 well, within the meaning of the habendum clause of the Fleck Lease, between December 2010 and June 2013. On that issue, the district court correctly held that the Fleck Lease did not terminate in

December 2010 or thereafter because there was never a "permanent" cessation of production of oil and gas from the Fleck Lease.

1. Any Cessation of Production from the Fleck 1 Well Was Temporary, and Therefore Insufficient to Terminate the Lease.

[¶25] The general rule involving cessation of production states that if production should cease temporarily, or if production ceases temporarily to be in paying quantities, such cessation will not result in a termination or forfeiture of the oil and gas lease. *See Sorum v. Schwartz (Sorum I)*, 344 N.W.2d 73, 76 (N.D. 1984); *Feland v. Placid Oil Co.*, 171 N.W.2d 829, 833 (N.D. 1969). The North Dakota Supreme Court has expressly held that temporary cessation of production will not, by itself, "automatically terminate" an oil and gas lease. *See Feland*, 171 N.W.2d at 833. "This is the universally accepted rule for leases." *Id.* (citing Annot., *Rights of Parties to Oil and Gas Lease or Royalty Deed after Expiration of Fixed Term Where Production Temporarily Ceases*, 100 A.L.R.2d 885, 3 (1965)).

[¶26] In *Sorum I*, for example, the only active wells on the lease had not produced for more than a year when the lessor filed suit to terminate the lease, and they still were not producing by the time of the trial, more than two years later. 344 N.W.2d at 74–75, 77. Despite the long gap in production, the district court held, and the Supreme Court affirmed, that the lessee should have additional time to bring at least one of the wells back into production and save the lease. *See id.* at 75, 77. The Court's decision was further affirmed in *Sorum II*, which was an appeal from an order canceling the relevant lease after remand. 411 N.W.2d at 653. In *Sorum II*, this Court held the district court's decision to terminate the lease was clearly erroneous even though operations following remand resulted in production of only 112 Mcf of gas and 25 barrels of oil. *See id.* at 653–54. *Sorum II* was decided in August 1987, which means this Court held it was clearly erroneous for the district court to terminate a lease that had produced a total of 112 Mcf of gas and 25 barrels of oil over the course of nearly seven years. *Id.* at 652. The Fleck Lease, by contrast, produced an average of more than 25 barrels of oil each month during the three-year period Fleck has highlighted.

[¶27] Moreover, *Sorum I* and *Sorum II* are not the only cases in which this Court has held that lengthy lapses in production will not automatically terminate a lease. In *Feland*, the well at issue did not produce any oil or gas for nine months, yet this Court held the temporary cessation was reasonable and the lease at issue remained valid and in effect. 171 N.W.2d at 836–37; *see also Greenfield v. Thill*, 521 N.W.2d 87, 89 (N.D. 1994) (holding a defeasible fee interest did not terminate despite a twenty-month gap in production). In this case, the Fleck 1 well produced at least some oil in all but a handful of the months during the disputed period, and, unlike the wells at issue in *Sorum*, *Feland*, and *Greenfield*, the Fleck 1 well was never completely shut in. To this day, the well is still maintained and consistently produces an average of a few barrels per day. In short, a permanent cessation of production never occurred.

2. Fleck Has Not Demonstrated Production from the Fleck 1 Well Was "Not in Paying Quantities."

[¶28] Despite continuing production, Fleck contends the Lease terminated because that production was not "in paying quantities." As Fleck emphasizes, courts have "generally interpreted" the term "production," as used in the habendum clause of oil and gas leases, "to mean 'production in paying quantities, that is, production in quantities sufficient to yield a return in excess of operating costs, even though drilling and equipment costs may never be repaid and the undertaking considered as a whole may ultimately result in a loss.' " *Tank*, 2014 ND 123, ¶ 12, 848 N.W.2d 691 (quoting 8 Martin & Kramer, *supra*, at 816). Notably, *Tank*'s discussion of the issue was dicta because the defendants had conceded that the well at issue stopped producing. *See id.* ¶ 22. Moreover, courts do not always require "production" to be "in paying quantities" to preserve a lease. *See, e.g.*, *Bruen v. Columbia Gas Transmission Corp.*, 426 S.E.2d 522, 525 (W. Va. 1992) (concluding a flat-rate lease did not require production in paying quantities). Nevertheless, even if production in paying quantities is required by the Fleck Lease and North Dakota law, Fleck's simple analysis of profits and losses of a single well over a carefully selected time period does not demonstrate the lack of production in paying quantities in this case.

[¶29] This Court has never said that production in paying quantities is *always* required on a month-by-month or year-by-year basis. Nor has the Court specifically identified the facts or circumstances that should be considered in determining whether production from a particular lease is in "paying quantities." If a well results in a loss for a month or even three years, the lease does not automatically terminate. Other circumstances beyond whether the revenue generated from the production from a particular well over a short time period must be factored into the analysis when considering whether production from a lease is in paying quantities.

[¶30] As previously noted, oil and gas leases are interpreted to give effect to the parties' intent at the time of contracting. *Tank*, 2014 ND 123, ¶ 10, 848 N.W.2d 691. Given the inconsistencies here regarding the definition of production and evidence in support of production, a more thorough analysis of the evidence beyond mere profit and loss is required. Fleck cannot simply point to a three-year period of time during which the expenses of operating a single well exceed the revenue generated by that well and assert that the Fleck Lease terminated because oil and gas were not produced in paying quantities. The Lessees must be given a "reasonable time" to determine whether their operations would return a profit and to evaluate "the average production of oil and gas, the cost of production, and the availability of markets." *Sorum II*, 411 N.W.2d at 654 (citations omitted). One cannot, as Plaintiffs attempt to do, take a snapshot of a particular well at a particular time and claim the lease on which that well is located is not producing or capable of producing in paying quantities.

[¶31] For example, it is well established in Texas that in order to terminate a lease based on lack of paying production the lessor must submit sufficient evidence to meet a two-prong test:

> (1) that the lease failed to yield a profit over a reasonable period of time and (2) that a reasonably prudent operator would not have continued to operate the well in the manner in which it was being operated for the purpose of making a profit and not merely for speculation.

Cannon v. Sun-Key Oil Co., Inc., 117 S.W.3d 416, 421 (Tex. Ct. App. 2003) (citing *Skelly Oil Co. v. Archer*, 356 S.W.2d 774, 783 (Tex. 1962); *Clifton v. Koontz*, 325 S.W.2d 684, 690–91 (Tex. 1959)); *see also* 3 Martin & Kramer, *supra*, § 604.5 (discussing paying production and collecting cases). In this case, there is no evidence in the record that a prudent operator would not have continued to operate the well for the purpose of making a profit. Indeed, the evidence that is available suggests the contrary is true. If Missouri River was operating the well merely to hold the Fleck Lease until some other operator drilled Bakken wells, as Fleck suggests, Missouri River would have presumably plugged the well when drilling began on the Bakken wells in the summer of 2013. *See* App. at 143. That did not occur. Missouri River continued to operate the Fleck 1 when the Bakken wells came on line and it continues to operate the well to this day. *See* Supp. App. at 34–35.

[¶32] The mere fact that the cost of operating the Fleck 1 well exceeded the revenue it generated from the sale of oil and gas over a carefully selected three-year period does not demonstrate that oil or gas was no longer being "produced" under the habendum clause. Accordingly, the district court's judgment should be affirmed.

B. Even if Production Permanently Ceased under the Habendum Clause, The Fleck Lease Remains in Effect Based on the Lessees' "Operations for the Drilling of a Well or Restoration of Production" on the Fleck Lease.

[¶33] In the event the Court concludes there was insufficient production from the Fleck 1 well to maintain the lease on its own, then the Court must also consider whether it was extended based on the resumption of "operations for the drilling of a well or restoration of production" under the cessation of production clause. *See* App. at 102. Under the cessation of production clause in the Fleck Lease, even if production "ceases," the Lease can be saved if operations for drilling a new well or restoring production on an existing well are commenced within ninety days. *See* App. at 102. Ongoing operations to improve production from the Fleck 1 well or obtain production from new wells saved the Fleck Lease.

1. Fleck Has Abandoned the Argument that the Lease Terminated under the Cessation of Production Clause.

[¶34] Before the district court, Fleck argued that production "ceased" under the cessation of production clause because new operations were not commenced within ninety-days of cessation of production. *See* Fleck's Dist. Ct. Br. at 12–17. Fleck has abandoned that argument, focusing instead on the assertion that the lease terminated under the habendum clause because oil and gas were not being produced in paying quantities. By abandoning the argument, Fleck recognizes that the ninety-day clock in the cessation of production clause does not begin to run unless production has actually ceased under the habendum clause.

[¶35] Eugen Kuntz, a former law professor at the University of Oklahoma and author of a widely respected treatise on oil and gas law, recognized the potential for confusion between the habendum clause and a savings provision in a cessation of production clause and urged caution when discussing the subject in his treatise. *See* 2 Eugene Kuntz, *A Treatise on the Law of Oil and Gas* § 26.13, pp. 415–18 and Supp. 157 (1989 and Supp. 2014).

> The doctrine of temporary cessation of production is a practical necessity, because oil and gas are never produced and marketed in a continuous, uninterrupted operation that goes on every hour of the day and night. Once it is recognized that any brief interruption in the operation must be tolerated as a practical matter, it becomes necessary to adopt a doctrine that permits temporary cessations of production. The [cessation of production] clause was never designed to eliminate or avoid the operation of such doctrine or to require that oil or gas be produced and marketed in a continuous, uninterrupted operation. It was intended to preserve a lease in order to permit a lessee to restore production if production should cease under circumstances that require drilling or reworking on his part in order to restore production.

Id. p. 417.

[¶36] Moreover, although the issue has never been specifically addressed by this Court, courts in Texas have followed Kuntz's suggestion when reviewing substantively similar provisions. *See Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 556 (Tex. 2002); *Peacock v. Schroeder*, 846 S.W.2d 905, 908–09 (Tex. App. 1993); *Bachler v. Rosenthal*, 798 S.W.2d 646, 649–50 (Tex. App. 1990). In *Anadarko*, the Court read the continuous operations clause as combining "a sixty-day time limit with a resumption of operations provision." *Id.* That court concluded, the continuous operations clause, therefore, triggered only "when the circumstances require the lessee 'to resume operations for drilling [or reworking] a well.'" *Id.* Likewise, in *Bachler* the court reviewed a lease with a sixty-day window for resuming operations, and held that "*if production never ceased*, as is the case here, the 60-day clause is not definitive of the period over which the trier of the facts must determine whether a lease is producing in paying quantities." 846 S.W.2d at 649 (citation omitted).

[¶37] Here, the habendum clause and cessation of production clause must be read together to give effect to both. Following the reasoning in *Anadarko*, *Bachler*, and *Peacock*, the cessation of production clause is only triggered when there is a permanent cessation of production such that it is necessary to drill a new well or rework an existing well.

2. Drilling Operations Conducted on the Sanders Wells Constitute "Operations for the Drilling of a Well" under the Fleck Lease.

[¶38] As noted above, two new wells have been drilled on a spacing unit that includes the Subject lands, specifically the Sanders 150-100-9-10-1H and Sanders 150-100-9-10-2H wells (hereinafter "the Sanders Wells"). The drilling of those wells further extended the Fleck Lease.

[¶39] Fleck contends that the Sanders Wells were drilled too late and with insufficient participation by the Lessees to save the Fleck Lease. Fleck's contention ignores the preparation for drilling that occurred before the actual drilling of the wells and the substantial investment Missouri River has made in them.

[¶40] "[T]he courts have been ready to find the commencement of operations (or the pursuit of drilling operations) where only the most modest preparations for drilling have been made." 6 Martin & Kramer, *supra*, § 618.1. Language such as "drilling operations," "commencement of operations," "commence operations to drill a well," and "commence to drill a well," have been similarly interpreted to mean

> any work or actual operations undertaken or commenced in good faith for the purpose of carrying out any of the rights, privileges or duties of the lessee under a lease, followed diligently and in due course by the construction of a derrick and other necessary structures for the drilling of an oil and gas well, and by the actual operation of drilling in the ground."

Id. (collecting cases from Wyoming, Kentucky, New Mexico, Kansas, Illinois, Ohio, Oklahoma, Pennsylvania, California, and others).

[¶41] In a recent Eighth Circuit case, the Court applied North Dakota law to several oil and gas leases and determined that activities in preparation for drilling, along with "the bona fide intention to proceed with diligence toward the completion of the well," are considered drilling operations that will maintain an oil and gas lease beyond the primary term. *Anderson v. Hess Corp.*, 649 F.3d 891, 897 (8th Cir. 2011). While the Eighth Circuit Court in *Anderson* did not specifically address what activities constituted drilling operations, the district court from which the case was appealed concluded the following activities as conducted by the defendant constituted "drilling operations" sufficient to sustain a lease beyond the primary term: (1) surveying and staking the wellsite; (2) submitting an application for and receiving approval for a permit; (3) moving equipment to wellsite and preparing surface; (4) leveling and lasering the well pad; (5) digging the drilling pit; (6) lining drilling pit with gravel and clay; (7) building access road to wellsite; (8) drilling hole for main conductor pipe; (9) moving tank used to store drilling fluid to site; (10) drilling rat hole and mouse hole; and (11) moving rig to the wellsite. *See Anderson v. Hess Corp.*, 733 F. Supp. 2d 1100, 1108 (D.N.D. 2010), *aff'd*, 649 F.3d 891 (8th Cir. 2011). The Eighth Circuit did not express disagreement with this holding. *See generally*, *Anderson*, 649 F.3d 891.

[¶42] Moreover, although some courts, including this one, have suggested some operation "associated or connected with the physical site of the well" is necessary to constitute "operations," *see Serhienko v. Kiker*, 392 N.W.2d 808, 812 (N.D. 1986) (quoting *Sheffield v. Exxon Corp.*, 424 So. 2d 1297, 1303 (Ala. 1982)), the purpose of such a requirement is unclear and unjustified in the modern regulatory environment. The regulatory requirements surrounding new drilling operations (as opposed to reworking operations like those at issue in *Serhienko*) are complex and demand significant time and effort for operators. For example, before an operator can began any onsite work, the operator must obtain a permit to drill from the NDIC. *See* N.D.A.C. § 43-02-03-16. And before the operator can apply for a permit, the operator typically must obtain NDIC approval of its proposed spacing for wells in that pool. *See* N.D.C.C. § 38-08-07; N.D.A.C. § 43-02-03-18. Prudent operators will also force pool the separately owned interests in the spacing unit before beginning operations. *See* N.D.C.C. § 38-08-08.

[¶43] Working interest owners who are engaged in the sometimes lengthy process of making plans and obtaining regulatory approval to drill a new well, with the good faith intent of following through and actually drilling the well, are engaged in drilling operations. In cases like *Serhienko* that involve reworking operations, it may make some sense to require operators to actually be on site fixing whatever is broken. 392 N.W.2d at 812. But with new wells, there are many necessary preparatory steps that have nothing to do with the well site. As a result, any requirement of a physical connection to the well site is outdated and unjustified.

[¶44] Keeping with the definition of drilling operations as outlined above, drilling operations for the Sanders Wells commenced no later than December 2011 when Zenergy, Inc. obtained a spacing order for a Bakken well on the Subject Lands, and continued through August 2012 when the initial permit was issued to drill a horizontal well on the spacing unit. Although a dispute between operators over which would actually drill the well further delayed the process and ultimately led Zenergy, Inc. to withdraw its application, applications for permits for wells that were actually drilled were submitted on April 25, 2013—three days after Zenergy, Inc.'s application was finally withdrawn. *See* App. at 217 (noting approval date of April 22, 2013); Supp. App. at 8–11.

[¶45] Moreover, before submitting the permit applications to the State of North Dakota for the Sanders Wells, Triangle expended significant resources gathering data and planning the Sanders Wells. *See* Standard Planning Report, Exhibit K to Affidavit of Michael D. Schoepf (Dist. Ct. Doc. ID# 61). Triangle completed surveys, drafted drilling plans, and incurred legal fees and other expenses to oppose Zenergy, Inc.'s permits and space and pool the Sanders Unit. *See id.*; Supp. App. at 3–11. Steps taken preparatory to drilling are not insignificant, and the cost of taking those steps is not born just by operators. *See* Supp. App. at 23. For example, the Authority for Expenditure, or AFE, for the first Sanders well indicates $130,000 in costs for "Land, Legal, Permits, Surveys, Damages." Supp. App. at 23. Those costs are incurred before any physical work is done on the ground, and they are born by all working interest owners, including Missouri River.

[¶46] Fleck nevertheless argues that the substantial operations for the drilling of the Sanders Wells should be disregarded because they were not conducted by Missouri River. Contrary to Fleck's argument, North Dakota's oil and gas conservation rules would have made it impossible for Missouri River to drill the Sanders Wells even if it had applied for a permit. *See* N.D.A.C. § 43-02-03-16.2 (outlining factors for consideration when evaluating competing applications for permits to drill wells). The NDIC's regulations provide a presumption that the owner of the majority of the interest in the spacing unit operates the well. N.D.A.C. § 43-02-03-16.2(f). Moreover, the other factors for consideration—such as the number of wells operated in the area—do not favor small operators like Missouri River. *See* N.D.A.C. § 43-02-03-16.2(a)–(e). Applying for a permit would have been futile and was not required.

[¶47] More importantly, although Missouri River does not operate the Sanders Wells, it contributed more than $2 million to the drilling and completion of those wells. *See* App. at 159, ¶ 5; Supp. App. at 18–33. Missouri River was not sitting by idly and waiting for another operator to further develop its Lease. It was actively participating in the exploration and production operations being conducted by its fellow operators.

3. Missouri River Engaged in Operations to Increase Production from the Fleck 1 Well.

[¶48] In addition to the Sanders well, the Lessees also engaged in operations to restore production to the Fleck 1 well. The Fleck Lease's cessation of production clause does not specifically require drilling of a new well. The Fleck Lease states the lease can be saved "if the lessee resumes operations for the drilling of a well *or* restoration of production" of an existing well. *See* App. at 102 (emphasis added). Here, to the extent production from the Fleck 1 well ever stopped, Missouri River at all times during temporary cessation was engaged in operations for restoration of production of the well—and was expending significant resources in the process. *See* App. at 98 and 158–59 ¶¶ 3–4. For example, Missouri River invested more than $100,000 in the well during July of 2011 to attempt to boost production. App. at 159–99. It likewise invested substantial sums in maintaining the well and continuing to operate while it evaluated the potential success of future operations. *See* App. at 98, 159 ¶¶ 3–4. Because the well was previously drilled, the only actions that needed to occur were steps for restoration of production. Missouri River invested substantial sums in its attempts to increase production from the Fleck 1 well.

II. In the Alternative, the Court Should Remand the Case to District Court for Determination of Disputed Factual Issues at Trial.

[¶49] Ultimately, the questions of whether production in paying quantities ceased under the habendum clause, and if it did, whether the lease was saved by other operations, are questions of fact. The Lessees submit that there can be no dispute in this case: there was never a permanent cessation of production that would cause the termination of the Fleck Lease. However, if the Court disagrees, there is at least enough evidence to create a fact issue that would prevent entry of summary judgment in favor of Fleck. Accordingly, if the Court declines to affirm the district court's judgment, it should remand the case to the district court for trial.

CONCLUSION

[¶50] For the reasons set forth above, Missouri River and Exxon respectfully request that the Court enter an order affirming the judgment entered by the district court. In the alternative, the case should be remanded for trial.

DATED this 22nd day of July, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2015, I electronically filed with the Clerk of the North Dakota Supreme Court the foregoing Brief along with a Supplemental Appendix by E-mail, and served the Brief and Supplemental Appendix by E-mail on the following:

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